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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ELECTRO-VOICE, INC.,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY OF ELECTRO-VOICE, INC. TO THE NATIONAL LABOR RELATIONS BOARD OPPOSITION

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Attachment A

Only includes pages 31-33 beginning with sub-heading:

"Abusing the Board's 10(j) Authority"

From Statement of Labor Policy Association Dated: September 17, 1996

Before the Senate Labor and Human Resources Committee
Oversight Hearing of the National Labor Relations Board

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NO. 96-469

ELECTRO-VOICE, INC. PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY OF ELECTRO-VOICE, INC. TO THE NATIONAL LABOR RELATIONS BOARD OPPOSITION

We respectfully ask the Court to exercise its discretion not to find mootness as it did in Super Tire Engineering Co. v. McCorkle 461 U.S. 115 (1974) where the Court held that the issue of the constitutionality of State Welfare Assistance to Strikers was not rendered moot by the termination of

petitioner's particular strike. The Court there found as we ask the Court to find here, there is a likelihood of a recurrent impact on other employers citing Southern Pacific Terminal Co. v. Interstate Commerce Com. 219 U.S. 498 in which the Court held that short term orders of the Interstate Commerce Commission evasive of appellate review would not be considered moot. The underlying question presented here, what is the appropriate standard to be followed by a Federal District Court in determining whether or not a National Labor Relations Board Petition for discretionary injunctive relief under Section 10(j) should be granted is similarly a short term order that would otherwise escape review that would have a recurrent impact on other employers.

The underlying issue in Super Tire was whether the obtaining of welfare for strikers aiding one side to a labor dispute interfered with the balance of pain envisioned by the Labor Act after impasse was reached in bargaining. In Super Tire the Court recognized the short term nature of a strike

would always prevent review. Similarly in the instant case the short term nature of such injunctions will escape review as they expire by statutory mandate upon the NLRB's decision on the merits. The overriding policy reason to take this issue at this time is the erroneous nature of the standard promulgated by the Seventh Circuit in the instant case at a time of escalating use of the 10(j) injunction.[1]

The NLRB urges that the exception to the mootness doctrine regarding matters "capable of repetition yet evading review" is limited to the standard they quote from the Court's decision in Nebraska Press Ass'n. v. Stuart 42 U.S. 537 at 546-547 (1976) where the standard was limited to class actions or circumstances where Petitioner does not "have a reasonable

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[1]The attached statement of the Labor Policy Association entitled the NLRB AN AGENCY IN CRISIS Presented to the Senate Labor and Human Resources Committee Oversight Hearing on the National Labor Relations Board dated September 17, 1996 demonstrated the improper tripling of the use of Section 10(j) petitions as a method of resolving labor law questions rather than the use of the administrative process. (See Attachment A)

expectation that the same complaining party would be subjected to the same action again" (see page 12 of NLRB's Opposition). An analysis more appropriate to the facts of this case is Super Tire, where similar to the instant case "the challenged governmental action has not ceased". (461 U.S. at 123)

The departure from the traditional equity standard by the 7th Circuit in denying 10(j) injunctive relief together with the failure to use a "reasonable cause" analysis as part of the "just and proper" requirement together with the escalating use of Section 10(j) creates a matter of imperative national importance this Court has not previously addressed. As stated in Super Tire:

> (The issue here) "... pervades every work stoppage, affects every existing collective bargaining agreement, and is a factor lurking in the background of every incipient labor

contract." (416 U.S. at 124)[2]

The NLRB in its Opposition suggests at page 18 that the 7th Circuit's and other circuit's failure to consider reasonable cause as part of the just and proper test creates an "insubstantial burden". It may be a burden easy to meet for purposes of Section 10(l) where the congressional design mandates the seeking of injunctive relief if there is "reasonable cause" to believe a secondary boycott exists. But the contrary is true under Section 10(j) where we contend the Board has the

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[2] This Court's further rationale in support of exercising jurisdiction in Super Tire is equally applicable here:

> "Certainly, the pregnant appellants in Roe v. Wade, 410 U.S. 113 (1973) and in Doe v. Bolton 410 U.S. 179 (1973) had long since out lasted their pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. 410 U.S. at 125 ... and consistent results were reached (by the Court) ... (in) cases concerning various challenges to State election laws. The important ingredients in those cases was governmental actions directly affecting, and continuing to affect, the behavior of citizens in our society." 416 U.S. at 126

burden to demonstrate it has "reasonable cause" to believe that the circumstances requiring it to seek a petition for injunctive relief are and after meeting that "hurdle" the District Court must consider whether the injunction the Board seeks is "extraordinary" "just and proper". The "reasonable cause" standard in Section 10(j) cases has been utilized as a gateway by others circuits to prevent labor law "by injunction". Thus the importation of the reasonable cause standard from Section 10(1) into Section 10(j) as part of the just and proper standard is appropriate.

We respectfully suggest that the Solicitor General's discussion of Velsicol Chemical Corp. v. United States cert. denied. 435 U.S. 942 (1978) is misplaced. Similarly the failure of Petitioner to file for a "vacatur" under U.S. v. Munsingwear 340 U.S. 36 (1950) is inapposite. Petitioner in the instant case is not seeking merely to void the particular decision of the 7th Circuit but is asking the Court to review the entire underlying issue of what the appropriate standard is for federal district

courts in determining whether to grant or deny the government's petition under Section 10(j) of the Act given the "just and proper" language of the statute. U.S. v. Munsingwear arises only in circumstances where the Court has granted review and then determined the issue to be moot.

This case is not brought because there is "disagreement among the circuit courts of appeal as to the appropriate legal analysis governing the issuance of Section 10(j) injunctions, (see page 14 of Solicitor's Brief,) rather because the use of Section 10(j) injunctions by the Board as shown by the Statement of the Labor Policy Association, (Attachment A), has resulted in a serious abuse of process. Contrary to the 7th Circuit's decision in Kinney v. Pioneer Press 881 F.2nd 485 (1989) the determination of "reasonable cause" is a relevant consideration in Section 10(j) cases. It is the only way in which an employer can exercise its rights to take discovery or otherwise examine the underlying basis for the General Counsel's belief, that a particular case is proper and we urge

an "extraordinary" case for 10(j) injunctive relief.[3]

The Seventh Circuit's sliding scale balancing harm with the "better than negligible chance of success standard" supported by the Solicitor General in his Opposition is a balancing that does not really take place. This can be seen from the "balance" used by the Seventh Circuit in articulating the nominal nature of its public interest requirement stating:

> "In other words in examining whether an injunction is in the public interest the Court must weigh potential public benefits against the potential public costs. The public interest is furthered, in part, by ensuring that an unfair

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[3]We respectfully ask this Court to revisit the decision it made in McLeod v. General Electric Co. 385 U.S. 533 (1967) in which the Court had granted a Petition for Writ of Certiorari raising the question of whether "traditional equitable principles" are applicable in Section 10(j) injunction petitions. Years later that issue not only is ripe for review but even more important in view of the increased utilization of Section 10(j) injunctions. See Petition in the instant case page 12 and Attachments A to this reply.

labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." (See Petitioner's Appendix page 28a)

In conclusion this Court has never had occasion to address how the "just and proper" standard is to be properly administered by a Federal District Court under Section 10(j). This is a question of imperative national importance especially in view of the escalating use of Section 10(j).[4]

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[4]In answer to the claim lack of jurisdiction raised in the Opposition at page 11 for Petitioners failure to appeal the District Court's mootness ruling, Petitioner asks the Court not to find this an impediment should the Court otherwise be satisfied that this case falls within the "capable of repetition, yet evading review" type of short term order relied on as a basis for this Super Tire decision.

In a case of "imperative public importance" we ask the Court in circumstances limited to cases involving short term orders evading review to waive the normal jurisdictional requirement suggested at page 7 footnote 11 of the Opposition as certiorari is sought from the Seventh Circuit use and creation of erroneous Section 10(j) standards, rather than a District Court, pro-forma holding following a remand.

Respectfully submitted,

Gerard C. Smetana
Counsel for Electro-Voice, Inc.,
Petitioner

Dated: December 23, 1996

ATTACHMENT A

THE NLRB: AN AGENCY IN CRISIS

STATEMENT OF THE LABOR POLICY ASSOCIATION

BEFORE THE SENATE LABOR

AND HUMAN RESOURCES COMMITTEE

OVERSIGHT HEARING ON THE

NATIONAL LABOR RELATIONS BOARD

BY

DANIEL V. YAGER

VICE PRESIDENT AND GENERAL COUNSEL

LABOR POLICY ASSOCIATION

SEPTEMBER 17, 1996

Attachment 1a to 5a
are Pages 31-33 of
the Statement as
Originally Submitted

Abusing the Board's 10(j) Injunction Authority

The Gould-Feinstein Board's disregard for the presumption of innocence on the part of employers was signaled shortly after the members were sworn into office by a marked increase in the use of injunctions under Section 10(j) of the NLRA. Heralded by a June 27, 1994, NLRB press release proclaiming "NLRB Injunction Activity Heats Up Under General Counsel Feinstein," [1]the Gould-Feinstein Board sought 134 10(j) injunctions from March 1994 to June 1996. This tripled the previous pace of 34 sought in fiscal year 1993. Only five were pursued against a union.

Section 10(j) authorized the Board to petition federal district courts for preliminary injunctions in cases where unfair labor practice complaints have been issued by the Board against either an employer or a union. The injunction remedy under Section 10(j) is intended to be available for extraordinary situations, since the party charged with the violation has not yet had a chance to prove his or her innocence. Thus, it can only be used to prevent "irreparable harm" where there is

[1]Towards the end of 1994, General Counsel Feinstein proclaimed: "I have made the increased utilization of Section 10(j) injunction proceedings a cornerstone of my administration of the Act." Report of the General Counsel on Case Handling Activity, March 3-November 25, 1994 (released Nov. 28, 1994) at 68.

"reasonable cause" that a violation has occurred.

As was stated by the late Frank W. McCulloch, NLRB chairman during the Kennedy-Johnson years (in which about 15 10(j) injunctions were sought per year), an injunction should be used-

> not as a broad sword, but as a scalpel, ever mindful of the dangers in conducting labor management relations by way of injunction.[2]

Moreover, the pursuit of a 10(j) injunction involves a significant commitment of NLRB General Counsel Rosemary Collyer:

> Section 10(j) litigation is more difficult and time consuming for Regional personnel than administrative litigation....Court papers must be flied within 48 hours of authorization to petition for an injunction, so the Regions inevitably go

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[2]Frank W. McCulloch, "The NLRB in Action," Address before the Eight Annual Joint Industrial Relations Conference, Michigan State University (April 19, 1952) (cited in Herbert R. Northrop & H. Lane Dennard. "The Return of 'Government by Injunction'? Public Policy and the Expansive Use of Section 10(j) of the NLRA," 22 Employ. Rel. L.J. 101, 110 (Summer 1996)).

> filed within 48 hours of authorization to petition for an injunction, so the Regions inevitably go into "overdrive" as soon as a recommendation for 10(j) relief is forwarded to Washington. This activity saps each understaffed Region, as it devotes its best litigators to the Court action and copes with all other investigations and representation cases with a short staff....Stories abound about R-case hearings [i.e., hearings held prior to a union representation election] being postponed because a Region is tied up in knots over 10(j) litigation.[3]

One would assume that the abandonment of the presumption of innocence required in a 10(j) injunction action could only be justified in the most clear-cut situations. Yet the 10(j) rampage of the early Gould-Feinstein Board months involved a number of situations that were plainly less than clear cut violations of the Act:

- enjoining an employer from closing an operation before a union representation election, even

[3]Rosemary M. Collyer, "The Board's Use of §10(j) Injunctions," Address at the American Bar Association Meeting, Florida (Feb. 1995) at 10.

though the operation had lost millions of dollars and had been put on "probation" by the company well before any union organizing had begun;[4]

- ordering an employer to reinstate an employee allegedly discharged for union activity but later proven to have been fired for stealing a commission sale from a co-employee;[5]
- ordering an employer to reinstate an employee allegedly discharged for union activity but later proven to have been fired for provoking an altercation with a supervisor and threatening him;[6] and
- Requiring an employer to spend more than $6 million to restore unionized operations, which had been subcontracted, even though the company had lost $16 million on the operations in the 17 months leading up to the

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[4]Miller v. LCF, Inc., 147 LRRM 2911 (N.D. Cal. 1994).

[5]Pye v. Jordan Marsh Stores Corp., No. 94-11509EFH (D. Mass. July 29, 1994).

[6]Zipp v. Caterpillar, Inc., 858 F Supp. 794 (C.D. Ill. 1994).

subcontracting and had subcontracted 97 percent of the work to unionized subcontractors.[7]

In each of these cases, the Board's requested injunction was denied by Mee Court, and, in those cases that have since been adjudicated (the first three), Hee employer has been found innocent of the allegation that prompted the injunction request.

The Gould-Feinstein Board's 10(j) assault ultimately backfired when Hee U.S. House of Representatives voted to include new restraints on the Board's injunction authority in the FY 1996 Labor HHS Appropriations measure. While the restrictions were not included in the FY 1996 Continuing Resolution, the number of 10(j) injunctions had declined significantly by the time that measure passed, and it was clear that the Board had received the message.

Despite this correction, the 10(j) experience illustrated the Board's disregard for the presumption of innocence historically guaranteed in our judicial system. The display of a similar attitude towards labor unions accused of labor law transgressions might have preserved the Board's image of neutrality. The Board's zeal for pursuing 10(j) actions, however, was directed almost universally at employers.

[7]Calarello v. "Automatic" Sprinkler Corp. of America, 55 F. 3d 208 (6th Cir. 1995) (injunction denied).